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### Exploring Sectoral Solutions for Digital Workers: The Status of the Artist Act Approach

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## EXPLORING SECTORAL SOLUTIONS FOR DIGITAL WORKERS: THE *STATUS OF THE ARTIST ACT* APPROACH

SARA J. SLINN\*

### ABSTRACT

*Digital workers have not had significant success in securing conventional forms of collective workplace representation, particularly statutory collective bargaining. This article examines an established sectoral bargaining statute, the Status of the Artist Act (SOA), as a possible model for collective bargaining legislation that is better suited to regulate digital work than the Wagner Act model (WAM) of labor legislation. Key features of the WAM labor legislation pose significant barriers for digital worker organizing. These include requirements to: demonstrate employee status, accurately estimate the number of employees in the proposed unit, the requirement to demonstrate sufficient support. The WAM is oriented towards single-employer, single location, enterprise-level bargaining units. This is ill-suited to the organization of digital work. Recent certification cases involving Uber, Lyft, and Foodora illustrate the difficulties of these WAM features for digital worker organizing. The SOA, applicable to self-employed professional artists, shares much of the WAM framework, but it departs from the WAM in crucial ways designed to overcome collective bargaining barriers for the arts sector. Key differences include: no requirement for workers to establish employee status; a broader approach to appropriateness relieves against fragmented, small, units characteristic of the WAM; a “most representative” standard instead of majority support means certification does not turn on the applicant’s ability to accurately determine the number of workers in the proposed unit; limited challenges to representativeness; and, collective agreements provide a minimum floor, facilitating representation of heterogeneous workers in a unit. Organization of work and workers in the digital work and arts sectors share important similarities including the “gig” nature of the work and the geographic dispersion of workers. This article suggests that the structural similarities between digital and arts work, reflected in the SOA framework, offer guidance for a more effective statutory collective bargaining system for digital workers.*

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## INTRODUCTION

This Article explores the prospects for a statutory framework offering digital workers access to collective bargaining on a sectoral basis that is better adapted to the needs of these workers than existing North American private sector labor legislation based on the Wagner Act model (WAM).<sup>1</sup> It considers a framework developed for arts and media workers, the Status of the Artist Act (SOA), as a possible starting point for such a statutory model.<sup>2</sup> While key features of the SOA depart from the WAM, it still has North American roots and has developed as a functioning collective bargaining regime over the last quarter century.

This Article proceeds as follows. Part I introduces the categories of digital work employed in this article. Part II briefly outlines experiences of digital workers accessing collective bargaining and considers the labor market and legal barriers to statutory collective bargaining encountered by these workers. Particular attention is paid to North American WAM legislation. Recent attempts by digital workers to certify under the WAM are examined to illustrate the shortcomings of this digital work framework. Part III introduces similar experiences of arts and media workers facing labor market and legal barriers to statutory collective bargaining as encountered by digital workers. It then outlines a North American statutory sectoral bargaining system designed for arts and media workers, and examines prospects for application of this model to digital workers. The Conclusion offers some final remarks on the prospects for statutory collective bargaining for digital workers in North America.

## I. CATEGORIES OF DIGITAL WORK AND COLLECTIVE WORKER ACTIVITY

Several complex and detailed typologies of digital work have been developed.<sup>3</sup> However, a simpler categorization scheme is employed for the purposes of this Article, drawing substantially on several existing typologies incorporating key characteristics of digital work relevant to collective representation and bargaining systems for these workers.<sup>4</sup> These features affect

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1. The key private sector collective bargaining statute in the United States, the 1935 National Labor Relations Act, is often referred to as the “Wagner Act” after New York Senator Wagner who sponsored the Act. 29 U.S.C. §§ 151–169 (2018). The Wagner Act established the essential elements of U.S. and Canadian collective bargaining legislation. DONALD D CARTER, GEOFFREY ENGLAND, BRIAN ETHERINGTON & GILLES TRUDEAU, *LABOUR LAW IN CANADA* 51 (2002).

2. Status of the Artist Act, S.C. 1992, c 33 (Can.) (in force 1995).

3. See, e.g., Florian A Schmidt, *Digital Labour Markets in the Platform Economy: Mapping the Political Challenges of Crowd Work and Gig Work*, FRIEDRICH-EBERT-STIFTUNG (2017), <https://library.fes.de/pdf-files/wiso/13164.pdf> [<https://perma.cc/A78N-KUUE>]; see generally Rebecca Florisson & Irene Mandl, *Platform Work: Types and Implications for Work and Employment-Literature Review*, EUROFOUND (Nov. 23, 2018), <https://www.eurofound.europa.eu/sites/default/files/wpefl8004.pdf> [<https://perma.cc/KHV9-HW8M>].

4. The categorization used here is based substantially on that developed by Janine Berg, Miriam Cherry & Uma Rani, *Digital Labour Platforms: A Need for International Regulation?* 16

workers' abilities to develop alliances, to operate collectively, and to avail themselves of legal and regulatory frameworks.<sup>5</sup> The importance of these characteristics of digital work is well recognized and incorporated in earlier categorizations,<sup>6</sup> with implications for the type of collective representation that may be feasible and desirable for digital workers.

The first key dimension on which digital work is categorized is the location of the work, and this feature is also proving to be a key challenge to regulating digital work. Digital platform labor services can be regarded as composed of two main categories: those involving work that is performed online (hereinafter "cloud work")<sup>7</sup> and those involving location-based and geographically limited work (hereinafter "place-based work").<sup>8</sup> Where work is performed is widely recognized as a fundamental division in contemplating regulation of digital platform work.<sup>9</sup>

Within each of these two sub-categories, two other dimensions or factors are recognized: the degree of skill required for the work, and whether the work is assigned to an individual or to a crowd. Both cloud and place-based work may

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REVISTA DE ECONOMÍA LABORAL 104, 108 (2019); Schmidt, *supra* note 3, at 3; Karolien Lenaerts, Zachary Kilhoffer & Mehtap Akgüç, *Traditional and New Forms of Organization and Representation in the Platform Economy*, 12 WORK ORG. LAB. & GLOBALIZATION 60, 68 (2018).

5. Hannah Johnston & Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*, 94 CONDITIONS OF WORK & EMP. SERIES, 1, 3 (2018); Schmidt, *supra* note 3, at 24.

6. See, e.g., Willem Pieter De Groen, Ilaria Maselli & Brian Fabo, *The Digital Market for Local Services: A One-Night Stand for Workers?*, CEPS SPECIAL REPORT (2016), <https://www.ceps.eu/ceps-publications/digital-market-local-services-one-night-stand-workers-example-demand-economy/> [<https://perma.cc/XC72-4KA8>]; Berg et al., *supra* note 4, at 108; Schmidt, *supra* note 3, at 6.

7. Work performed online has been variously labeled as "cloud work." Schmidt, *supra* note 3, at 5; Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdsourcing, and Labor Protection in the "Gig-Economy"*, 37 COMP. LAB. L. & POL'Y J. 471, 473–474 (2016) (defining "crowdsourcing" as work done through online platforms); Hannah Johnston, *Labour Geographies of the Platform Economy: Understanding Collective Organizing Strategies in the Context of Digitally Mediated Work*, 159 INT'L LABOUR REV. 25, 29 (2020) (explaining how the "spatiality of crowdsourcing" can be characterized as "elusive and abstract"); Berg et al., *supra* note 4, at 108 (coining the term "web-based platforms"); De Groen et al., *supra* note 6, at 2 (categorizing "virtual/global services" as part of the digital labor market); Lenaerts et al., *supra* note 4, at 63 (also categorizing "virtual/global services").

8. See Johnston & Land-Kazlauskas, *supra* note 5, at 3 (referring to location-based work as "place-based"); De Groen et al., *supra* note 6, at 2 (referring to "physical/local services" as a category of the digital labor market); Lenaerts et al., *supra* note 4, at 63 (referring to "physical/local services" as a category of work in the platform economy); Schmidt, *supra* note 3, at 5 (specifying "gig work" as work that needs to be done in a specific location); Berg et al., *supra* note 4, at 108 (categorizing "location-based platforms" as part of the digital labor market).

9. See, e.g., De Groen et al., *supra* note 6, at 2; Berg et al., *supra* note 4, at 108; Schmidt, *supra* note 3, at 5, 6; Johnston & Land-Kazlauskas, *supra* note 5, at 3.

be high or low skilled, although low skilled predominates in place-based digital work.<sup>10</sup>

## II. DIGITAL WORKERS AND ACCESS TO COLLECTIVE BARGAINING

Several studies have sought to map the nature and extent of collective organizing or representation of digital workers.<sup>11</sup> The conclusion reached is that, overall, these workers have not had significant success in securing conventional forms of collective organization<sup>12</sup> and, to the extent that it has developed, it is typically found outside of North America and under non-WAM regulatory systems. This part of the Paper outlines the challenges faced by digital workers to access statutory collective bargaining, as identified in the literature and illustrated by examples from three recent statutory organizing efforts by place-based digital workers in North America involving Foodora, Uber, and Lyft.<sup>13</sup>

### A. *Digital Worker Organizing*

Studies of informal and statutory collective activity by digital workers find distinct differences in the likelihood and types of collective organizing undertaken by different categories of digital workers.<sup>14</sup> In this regard, the most important differentiating factors are found to be between cloud and place-based work, low and high-skilled work, and the degree of fit between the organization of that work and the existing statutory system.<sup>15</sup>

Place-based digital work tends to correspond more closely to existing statutory frameworks, meaning that these statutory systems are more available to these workers as means for collective activity, with the result that these workers' collective labor efforts are heterogeneous, reflecting local systems, culture, and history.<sup>16</sup> This contrasts with cloud work, which corresponds poorly with existing regulatory systems, such that these workers tend to seek new collective labor solutions, particularly those that can overcome the inter-jurisdictional nature of this work.<sup>17</sup>

Reflecting this, a study of European and North American examples of digital worker collective activity found that statutory collective bargaining had been

10. De Groen et al., *supra* note 6, at 1.

11. See, e.g., Lenaerts et al., *supra* note 4, at 61; Florisson & Mandl, *supra* note 3, at 1; Bethany Hastie, Note, *Platform Workers and Collective Labour Action in the Modern Economy*, 71 UNIV. NEW BRUNSWICK L. J. 40 (2020); Johnston & Land-Kazlauskas, *supra* note 5, at 1; Johnston, *supra* note 7, at 25.

12. Florisson & Mandl, *supra* note 3, at 100.

13. Only place-based examples are utilized here as, to my knowledge, no statutory collective bargaining organizing efforts are ongoing for cloud workers in North America.

14. Note that these studies do not engage with the particular features of the WAM.

15. Lenaerts et al., *supra* note 4, at 72, 74; Johnston, *supra* note 7, at 40.

16. Johnston, *supra* note 7, at 28.

17. *Id.*

achieved in a few instances, though only by place-based digital workers. Notably, none of these cases were North American.<sup>18</sup> Place-based workers had participated in statutory European works councils, a non-collective bargaining, information, or consultation collective voice mechanism. Although works councils were *possible* for cloud workers to access, the researcher concluded that it would be very difficult, given the decoupling of work from location and time that characterizes cloud work.<sup>19</sup> This study identified non-statutory, multi-enterprise arrangements as a promising means of transnational, centrally coordinated regulation of cloud work platforms, pointing to the example of the “Crowdsourcing Code of Conduct” agreement reached by German union IG Metall and eight German cloud work platforms, and the associated Ombuds Office that has been created.<sup>20</sup>

It is important to recognize, however, that this regime does not involve collective bargaining and does not produce an enforceable collective agreement. It is based on individual complaints, with the hope that the Ombuds Office’s identification of structural problems from these complaints, decisions, and recommendations may contribute to reform. Hannah Johnston answers concerns about lack of enforceability and voluntary participation by suggesting that market access opportunities can be used to encourage participation and compliance and other, unspecified, enforcement mechanisms could be utilized.<sup>21</sup>

More generally, a study of European countries with substantial industrial relations activity relating to digital work emphasized both the location and the skill level of the work as determinants of whether, and in what types of collective activity, digital workers engaged. Digital workers engaged in high-skilled work were, generally, found to be more likely to organize than low-skilled workers.<sup>22</sup> However, overall, the low-skilled, place-based workers, such as ride-share or delivery platform workers, were the most likely category of digital worker to achieve collective organization. Researchers attributed this success partly to the fact that these workers likely work in urban centers and in some geographic proximity, which facilitates organizing, since workers are more easily identified and contacted. Overall, place-based workers secured more “concrete forms” of collective organization, while cloud workers, who may be more heterogeneous, only achieved “soft” forms of collective organizing.<sup>23</sup>

These findings are generally consistent with conclusions of other studies: conventional forms of collective representation are rare among digital workers;

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18. *Id.* at 35–37.

19. *Id.* at 34.

20. *Id.*, *supra* note 7, at 38–39. Note that Johnston refers to “crowdsource” work, which accords with the “cloud work” category employed in this Article.

21. Johnston, *supra* note 7, at 38–39.

22. Lenaerts et al., *supra* note 4, at 69.

23. *Id.* at 75.

physical distance and isolation are key impediments; and, related to this, place-based digital workers are more promising targets for regulation.<sup>24</sup>

### *B. Access to Collective Bargaining: Challenges for Digital Workers*

Impediments to accessing collective bargaining for digital workers fall into two categories. First, there are obstacles stemming from the nature of the labor market in which these workers participate, and which may differ between cloud and place-based work. Second, there are legal impediments to organizing these workers. Neither type of barrier is unique to digital work. Indeed, many of these impediments to collective bargaining are familiar to artists, as is discussed below.

#### 1. Labor Market Barriers

Digital workers face an array of obstacles to accessing statutory collective bargaining that relate to the nature of this labor market, with some of these barriers experienced more acutely by cloud workers as compared to place-based workers. First, digital workers tend to be geographically dispersed, isolated, and may be highly mobile (including moving among “gigs” within and across sectors), and the work is often short-term and/or task-based. As a result, workers may be difficult to locate, contact, and organize.<sup>25</sup> For cloud work, especially, the lack of a shared work location may make it difficult for workers to develop shared interests or occupational identity, both key foundations for collective worker action. This is also a challenge for place-based digital workers, despite the local nature of their work.<sup>26</sup> Geographic dispersion can also lead to regulatory complexity, as workers for a given platform may be dispersed across multiple jurisdictions and individual workers may move across jurisdictions during the course of their work.<sup>27</sup>

A second, related, complication particularly relevant to place-based digital work, such as ride-shares, is that there may be a mismatch between regulatory levels. While labor and employment regulation tend to be at the supranational, national, sectoral, or state/provincial levels, it may be local governments, such as municipal authorities, that have the greatest regulatory engagement with platforms.<sup>28</sup>

24. Florisson & Mandl, *supra* note 3, at 100; Schmidt, *supra* note 3, at 8, 9.

25. Johnston & Land-Kazlauskas, *supra* note 5, at 3, 4, 24; Johnston, *supra* note 7, at 29; Florisson & Mandl, *supra* note 3, at 100.

26. Johnston, *supra* note 7, at 29, 30.

27. Johnston & Land-Kazlauskas, *supra* note 5, at 24.

28. Lenaerts et al., *supra* note 4, at 66. In some cases, municipal engagement with platforms has produced labor and employment regulation. See the examples of ride-share labor and employment regulation applied by the cities of Seattle and New York using municipal authority. Hannah Johnston, *Workplace Gains Beyond the Wagner Act: The New York Taxi Workers Alliance and Participation in Administrative Rulemaking*, 43 LAB. STUD. J. 1, 3 (2018); Charlotte Garden,

Third, solidarity among digital workers may be difficult to develop, as in many cases these workers are in competition with one another, a feature of much task-based, on-demand platform work.<sup>29</sup> Some contend that an entrepreneurial ethos among high-skilled digital workers is incompatible with labor law concepts.<sup>30</sup>

Finally, one of the legal impediments addressed below is that of digital workers' status as "employees" or another category of worker, but this can also give rise to a practical collective bargaining difficulty. Difficulty in identifying status can also make it difficult to identify the "bargaining counterpart" for these workers, in part because platforms tend to regard themselves as an "intermediary" rather than as an "employer."<sup>31</sup> This can arise both with independent contractors and those workers who don't clearly meet the traditional features of being an "employee."

## 2. Legal Barriers

Legal impediments to digital workers' access to collective bargaining include barriers common among jurisdictions: barriers related to employee status to competition laws.

The first legal obstacle, employee status, is a feature of the WAM, although is not exclusive to this system. Many jurisdictions limit access to statutory collective bargaining to workers categorized as employees. As many digital workers are independent contractors, or fall somewhere between traditional employees and independent contractors, even where this limitation does not exclude the workers, it may be a difficult, time-consuming, and uncertain project to obtain a legal decision on status.

Some jurisdictions, including several in North America, include recognition of a "dependent contractor" category located between those of employee and independent contractor, extending the same rights to dependent contractors as are available to employees.<sup>32</sup> Nonetheless, employee status remains a barrier in

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Note, *The Seattle Solution: Collective Bargaining by For-Hire Drivers & Prospects for Pro-Labor Federalism*, 12 HARV. L & POL'Y REV. ONLINE 1, 11, 17 (2017).

29. Johnston & Land-Kazlauskas, *supra* note 5, at 24; Johnston, *supra* note 7, at 30.

30. Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 8 U. CHI. LEGAL F. 177, 177 (2017).

31. Johnston & Land-Kazlauskas, *supra* note 5, at 23; Lenaerts et al., *supra* note 4, at 61.

32. Collective bargaining legislation in several Canadian jurisdictions have enlarged the definition of "employee" to include dependent contractors, with the result that, in these jurisdictions, dependent contractors have access to unionization under general collective bargaining statutes. See, e.g., in the federal jurisdiction, the Canada Labour Code, R.S.C. 1985, c L-2, s. 3(1) includes a definition of "dependent contractor" and the definition of "employee" explicitly provides that it "includes a dependent contractor." The Ontario Labour Relations Act, S.O. 1995, c 1, Sched. A, s.1(1) takes the same approach. See also proposals to establish a "third category" similar to the dependent contractor category common in Canada, Miriam A. Cherry & Antonio Aloisi, *Dependent Contractors in the Gig Economy: A Comparative Approach*, 66 AM. UNIV. L. REV. 635 (2016) and



many WAM statutes, even for dependent contractors and certainly for independent contractors.<sup>33</sup>

Difficulty organizing digital workers may also arise indirectly from the question of employee status and workers' own perceptions of both their status and their work, and workers' own uncertainty or misunderstanding about their status may discourage collective bargaining efforts. Digital workers, even where they may qualify as employees (or dependent contractors in jurisdictions where this is relevant), may mistakenly believe that they are independent contractors and, therefore, ineligible to engage in statutory collective bargaining.<sup>34</sup> Workers may come to this understanding on their own, or as a result of the platform's assertions of their independent contractor status. In some cases, these workers place high value on their autonomy and regard it as inconsistent with statutory collective bargaining.<sup>35</sup> Moreover, given the nature of digital work, some may not identify it as work and, therefore, may not be alive to the prospect of collective representation.<sup>36</sup> Furthermore, collective bargaining may be of little interest to workers engaging across multiple platforms, gigs, or sectors, or who spend the majority of their working time engaged in non-digital work, or who regard digital work as a temporary phase in their working lives.<sup>37</sup>

A second commonly identified legal barrier arises from competition law restrictions on collective bargaining of terms and conditions of work by self-employed workers, as this may constitute action by "undertakings" and "price fixing," negatively affecting consumers' interests under these laws.<sup>38</sup> A recent

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a proposal to create an intermediate category of "independent workers" with access to a subset of statutory labor and employment rights available to employees. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty First-Century Work: The "Independent Worker,"* THE HAMILTON PROJECT DISCUSSION PAPER (Dec. 2015). Notably, Harry Arthurs, credited with proposing the Canadian dependent contractor approach, recommended establishing a new category of "autonomous worker," which would include independent contractors providing similar services and under similar conditions as employees, who would be eligible for limited statutory minimum employment standard protection. This coverage would be limited "[t]o the extent necessary to protect their basic right to decent working conditions, and to protect the interests of employees from unfair competition." Sector-specific criteria for this category and eligible protections would be established by a government consultation process, which would include representatives of autonomous workers. HARRY W. ARTHURS, *FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY* 64 (2006) at Recommendations 4.2 and 4.3.

33. Michael Lynk, *A Review of the Employee Occupational Exclusions Under the Ontario Labour Relations Act, 1995*, ONTARIO MINISTRY OF LABOUR at 61, Dec. 2015.

34. Lenaerts et al., *supra* note 4, at 61.

35. *Id.* at 72.

36. *Id.*

37. Florisson & Mandl, *supra* note 3, at 100; Johnston & Land-Kazlauskas, *supra* note 5, at 4.

38. Johnston & Land-Kazlauskas, *supra* note 5, at 23–24; Antonio Aloisi & Elena Gramano, *Workers Without Workplaces and Unions Without Unity: Non-Standard Forms of Employment, Platform Work and Collective Bargaining*, 107 BULLETIN COMP. LAB. RELATIONS (2019); Florisson & Mandl, *supra* note 3, at 100; Lenaerts et al., *supra* note 4, at 72.

instance of United States anti-trust law being used to challenge a collective bargaining scheme for independent contractor drivers established by a Seattle city ordinance has received a great deal of scholarly and media attention.<sup>39</sup>

### 3. The Wagner Act Model as a Particular Challenge

In addition to the legal impediments encountered in most jurisdictions, two key features of the WAM common to most North American collective bargaining legislation are significant barriers to certification for non-standard workers, such as digital workers. These include the “sufficient-support” requirement for certification, and the nature of appropriate bargaining units.

First, the certification process requires applicant unions to demonstrate a sufficient level of support within the proposed bargaining unit in order for the labor board to hold a representation vote.<sup>40</sup> While the necessary level of support varies among jurisdictions, under the National Labor Relations Act, for instance, a showing of interest from at least thirty percent of the employees in the proposed unit is required.<sup>41</sup>

As this threshold requirement is calculated based on the total size of the proposed unit, it is necessary for the applicant union to be able to accurately estimate the number of employees, in order to have reasonable confidence that the application will be viable and will not be dismissed for failing to meet this test of sufficient support. For unions seeking to represent workers who are dispersed, isolated, and have no fixed work locations, this can be a virtually impossible task. Moreover, significant negative consequences can apply if the union miscalculates and fails to meet the threshold. Not only will the

39. SEATTLE, WASH., ORDINANCE 124968 ¶ I (Dec. 23, 2015) (codified at SEATTLE, WASH., MUN., CODE §§ 6.310.110, 6.310.735 (2017)). See, e.g., Johnston & Land-Kazlauskas, *supra* note 5, at 27–28; Garden, *supra* note 28; Dmitri Iglitzin & Jennifer L. Robbins, Note, *The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49, 55 (2017). In April 2020, this matter was dismissed at the parties’ request, following amendments to the ordinance removing the issue of wages, and introduction of a new “Fare Share” ordinance providing a minimum wage, additional driver protections, a Driver Resolution Center to provide advocacy for drivers, and an arbitration procedure for driver deactivations, but not collective bargaining. *Legal Challenge to Seattle’s Uber Drivers Collective Bargaining Ordinance Ends*, SEATTLE CITY COUNCIL INSIGHT (Apr. 10, 2020), <https://sccinsight.com/2020/04/10/legal-challenge-to-seattles-uber-drivers-collective-bargaining-ordinance-ends/> [<https://perma.cc/3QSV-4QRA>].

40. Some Canadian jurisdictions utilize a card-check certification rather than a mandatory vote process, in which case certification is determined, based on whether authorization cards are collected from a sufficient proportion of employees in the proposed unit, although the level of necessary support is significantly higher than in mandatory vote procedures. See, e.g., Quebec Labour Code, CQLR c C-27, Division III, where, in Quebec, the board may certify where more than fifty percent of employees have signed union cards; a vote will be required if cards are obtained from between thirty-five and fifty percent of employees in the proposed unit.

41. Nat’l Lab. Relations Act, 29 U.S.C. §§ 151–169, 159(5)(e) (2018).

certification application be dismissed, but lengthy bars to reapplication may apply.<sup>42</sup>

The second legal obstacle relates to the nature of bargaining units contemplated under the WAM. Certification under WAM systems is highly decentralized, reflecting single-employer, single-location, enterprise-level bargaining units.<sup>43</sup> Single-employer, multi-location certifications are possible but uncommon, and parties may choose to engage in voluntary multi-employer bargaining, although this is increasingly uncommon.<sup>44</sup> This decentralized representation structure is not well suited to digital work, where workers tend not to have fixed work locations and are often dispersed across a wide geographic area. Even in the case of place-based digital workers, such a bargaining structure is a poor fit, even where a bargaining unit may be permitted to cover a geographic area rather than a specific work site.

### C. *Recent Collective Bargaining Efforts Under the Wagner Act Model*

Three recent cases illustrate the intersection of labor market and legal obstacles to accessing statutory collective bargaining for digital workers. They are significant, even for those digital workers most able to act collectively—place-based digital workers—and even in those jurisdictions providing among the most favorable variation of WAM legislation—those treating dependent contractors as employees.

The first case involved an effort by the Canadian Union of Postal Workers (CUPW) to unionize Foodora drivers in the cities of Toronto and Mississauga. Organizing began in May 2019, and a certification application was filed on July 31, 2019. Foodora raised several objections to the application.<sup>45</sup> It argued that all proposed bargaining unit members were independent contractors and, therefore, not entitled to seek certification. Foodora also disputed CUPW's estimate of the proposed bargaining unit size as too low and asserting that, therefore, CUPW had failed to demonstrate sufficient support to meet the statutory minimum to be entitled to a representation vote. While the Ontario Labour Relations Board ordered a vote held in August 2019, since it was not

42. See, e.g., Ontario Labour Relations Act, S.O. 1995, c 1, Schedule A, ss. 111(2)(k) (board has authority to bar an unsuccessful applicant and may refuse to accept an application by another union representing the employees, for up to a year from the date of dismissal).

43. JOHN O'GRADY, GETTING ON TRACK: SOCIAL DEMOCRATIC STRATEGIES FOR ONTARIO 158 (Daniel Drache ed. 1992).

44. Harry C Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3, 15 (1993).

45. Canadian Union of Postal Workers v. Foodora Inc., 2020 CanLII 16750 (ON LRB) (Can.), <https://www.canlii.org/en/on/onlrb/doc/2020/2020canlii16750/2020canlii16750.html> [https://perma.cc/VM4S-SQL3].

certain that CUPW had established sufficient support, it also ordered the ballots sealed pending determination of outstanding issues.<sup>46</sup>

Although the board concluded that Foodora workers are “dependent contractors,” and thus eligible to unionize, this decision was not issued until February 2020.<sup>47</sup> A hearing to determine the size of the proposed bargaining unit and, therefore, whether a vote was entitled to be held and the denominator for calculating the vote outcome, was held in early June.<sup>48</sup> Later that month, the board decided that the numerical difference between the parties’ positions on membership evidence was not significant. Therefore, it found that CUPW had demonstrated sufficient support to be entitled to a representation vote, and it ordered that the unchallenged ballots in the sealed ballot box be counted.<sup>49</sup> After concluding that the remaining challenged ballots would not affect the vote outcome, the board announced the result of the vote and issued a certification on June 17, 2020, noting that the unfair labor practice (ULP) complaint may now be moot.<sup>50</sup> In the final result, eighty-eight percent of the unchallenged ballots were in favor of unionization.<sup>51</sup>

Meanwhile, in late April 2020, Foodora had announced that it was ceasing its Canadian operations and seeking creditor protection under bankruptcy legislation.<sup>52</sup> CUPW responded by alleging that this closure constituted a ULP, but withdrew this complaint in fall 2020.<sup>53</sup>

46. A ULP complaint was also filed but adjourned *sine die* on the parties’ agreement. (Board File No. 1376-19-U.)

47. Canadian Union of Postal Workers v. Foodora Inc., *supra* note 45, at 1.

48. Canadian Union of Postal Workers v. Foodora Inc. d.b.a. Foodora, 2020 CanLII 40986, 1 (ON LRB), <http://canlii.ca/t/j8bml>.

49. *Id.*

50. Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora, 2020 CanLII 41787, 1 (ON LRB), <http://canlii.ca/t/j8d95>.

51. *The Results are in: 88.8 Percent of Foodora Couriers Vote Yes to Union!*, CUPW (June 16, 2020), <https://www.cupw.ca/en/results-are-888-percent-foodora-couriers-vote-yes-union> [<https://perma.cc/manage/create?folder=7821>].

52. *Foodora Canada Announces Plans to Close Business While Assuring Support for Employees*, GLOBALNEWSWIRE (Apr. 27, 2020), <https://www.globenewswire.com/news-release/2020/04/27/2022709/0/en/foodora-Canada-announces-plans-to-close-business-while-assuring-support-for-employees.html> [<https://perma.cc/NH5T-9WUH>]; Sara Mojtehdzadeh, *Foodora Initiates Bankruptcy Proceedings in Canada, Leaving \$4.7 Million in Debt*, THE STAR, (Apr. 29, 2020), <https://www.thestar.com/business/2020/04/29/foodora-declares-bankruptcy-in-canada-leaving-47-million-in-debt.html> [<https://perma.cc/VF5C-4EE8>]; Canada, Bankruptcy and Insolvency Act, RSC 1985, c B-3.

53. Ontario Labour Relations Act, S.O. 1995, c 1, Schedule A, as amended; Canadian Union of Postal Workers v. Foodora Inc. d.b.a. Foodora, 2020 CanLII 36569, 1 (ON LRB), <http://canlii.ca/t/j7zdd>; [<https://perma.cc/M4PY-YTQ8>]; personal communication with the Ontario Labour Relations Board.

The second case involved an attempt by Uber Black limousine and SUV drivers (Uber) to unionize in the cities of Toronto and Mississauga.<sup>54</sup> Organizing commenced in the summer of 2019 by the United Food and Commercial Workers International Union (UFCW), and a certification application was filed in January 2020.<sup>55</sup> Uber raised several objections to the certification application. In addition to challenging the appropriateness of the proposed unit, Uber's key objections were the same as those raised by Foodora: it challenged drivers' status and disagreed with the number of individuals UFCW estimated were in the proposed unit and, therefore, contended that the application lacked evidence of sufficient support. The Ontario Labour Relations Board, without deciding the appropriateness of UFCW's proposed unit, ordered that Uber's proposed unit, which had a wider geographic scope than UFCW's proposed unit, be used for the voting constituency.<sup>56</sup> A vote was held in late January 2020 and the ballot box was sealed due to a potentially material difference in the disputed size of the voting constituency.<sup>57</sup> At the end of July 2020, the board rejected Uber's claim that the union lacked sufficient membership support to be entitled to a representation vote.<sup>58</sup> The employer sought reconsideration of this decision and, at the time of this writing, this issue as well as the employee status and bargaining appropriateness issues remain outstanding.<sup>59</sup>

54. See *United Food and Commercial Workers Int'l Union (UFCW Canada) v. Uber Canada Inc.*, 2020 CanLII 3649 (ON LRB), and related decisions.

55. *Toronto Uber Drivers Join UFCW Canada, Calling for Fair Pay, Respect*, GLOBENEWSWIRE (June 30, 2020), <https://www.globenewswire.com/news-release/2019/06/26/1874797/0/en/Toronto-Uber-drivers-join-UFCW-Canada-calling-for-fair-pay-respect.html> [<https://perma.cc/H5VB-LQ55>]; Tara Deschamps, *Uber Black Drivers Fight for Unionization at Labour Board Hearing*, THE STAR (June 30, 2020), <https://www.thestar.com/business/2020/06/05/uber-black-drivers-fight-for-unionization-at-labour-board-hearing.html> [<https://perma.cc/A62C-689L>].

56. *United Food and Commercial Workers Int'l Union (UFCW Canada)*, *supra* note 54.

57. *Id.* ¶ 15.

58. *United Food and Commercial Workers Int'l Union (UFCW Canada) v. Uber Canada Inc.*, 2020 CanLII 54980 (ON LRB), <http://canlii.ca/t/j9404> [<https://perma.cc/SU6Y-5XAM>]. (Solely for the purposes of resolving that issue, the parties had agreed to assume that the drivers were dependent contractors and that the proposed unit could be appropriate for bargaining.)

59. *United Food and Commercial Workers International Union (UFCW Canada) v. Uber Canada Inc.*, 2020 CanLII 64802 (ON LRB), <http://canlii.ca/t/j9kwz> [<https://perma.cc/D5JV-L6VM>]. As a result of a June 26, 2020 decision of the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 CanLII 16 (Can. S.C.C.), the question of employee status of Uber drivers in Ontario will soon be before Ontario courts. The Supreme Court upheld an Ontario Court of Appeal decision finding that the arbitration clause in the standard form services agreement Uber utilizes for its drivers is invalid due to unconscionability and because it purports to contract out of provisions of relevant minimum standards of employment legislation. The genesis of this case was a proposed class-action lawsuit, commenced by an Uber driver, which claimed that drivers were employees, not independent contractors, and therefore had been improperly denied statutory minimum standards of employment. *Id.*

Interestingly, prior to the vote, UFCW had raised a concern that the board's direction that all individuals "who had an employment relationship" with Uber were eligible to vote might lead some drivers in the voting constituency to refrain from voting if they believed they were not employees. In response, the board confirmed that "all individuals in the voting constituency, whether or not they believe themselves to be employees or to have an employment relationship, may participate in the representation vote" and directed Uber to immediately email copies of the board's decision to drivers.<sup>60</sup> Once again, we see the issues of status and total number of workers in the proposed bargaining unit to be subjects of employer opposition and leading to extremely lengthy delays in determination of the certification.

Notably, in both the Foodora and Uber cases, the labor board explicitly remarked that the legal issues and tests relating to employee status and to sufficiency of connection to the workplace for workers to be included in assessments of support are not new issues for the board and did not necessarily demand new tests, despite the new technological contexts.<sup>61</sup>

The final case involved the United Food and Commercial Workers International Union, Canada, Local 1518 (UFCW 1518), which started a campaign to represent Uber and Lyft drivers in British Columbia in Fall 2019, at the time these companies applied to operate in the province.<sup>62</sup>

In November 2019, UFCW 1518 unsuccessfully attempted to have the status issue determined by the board, even before filing a certification application.<sup>63</sup> It sought a declaration from the board that certain Lyft and Uber drivers are dependent contractors and, therefore, "employees" as defined in the relevant legislation so that the drivers "know they can access the rights afforded by the Code."<sup>64</sup> In March 2020, the British Columbia Labour Relations Board held that, even if the union had standing to seek this declaration, there was no labor relations purpose for doing so. In the alternative, as determination of the matter would likely require significant board time and resources, the board held that the

60. *United Food and Commercial Workers International Union (UFCW Canada) v. Uber Canada Inc.*, 2020 CanLII 4510 (ON LRB).

61. *Foodora Inc. d.b.a. Foodora*, 2020 CanLII 25122 at para. 172; *United Food and Commercial Workers International Union (UFCW Canada) v. Uber Canada Inc.*, 2020 CanLII 54980 (ON LRB), <http://canlii.ca/t/j9404> [<https://perma.cc/TG4E-R9AP>] at para. 57.

62. *Fairness for Uber Drivers*, UFCW 1518, <https://www.ufcw1518.com/fairness-uber/> [<https://perma.cc/7MVP-EQBN>] (last visited June 7, 2020).

63. *UFCW 1518 Enters Mediation with Uber and Lyft in B.C.*, UFCW CANADA (Dec. 19, 2019), [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=32492:ufcw-1518-enters-mediation-with-uber-and-lyft-in-b-c&catid=10124&Itemid=6&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=32492:ufcw-1518-enters-mediation-with-uber-and-lyft-in-b-c&catid=10124&Itemid=6&lang=en) [<https://perma.cc/NZ5P-RG7M>] (last visited June 30, 2020).

64. *Lyft Canada Inc. v. United Food And Commercial Workers International Union, Local 1518*, 2020 CanLII 2019-068701, ¶8, <https://www.canlii.org/en/bc/bclrb/doc/2020/2020bclrb35/2020bclrb35.html> [<https://perma.cc/FU9X-NQ4H>].

issue would be appropriately addressed in the context of an application in which status determination is necessary to the matter at issue.<sup>65</sup>

UFCW 1518 also challenged the “Terms of Service” to which these platforms required drivers to agree, and which stipulated that drivers were not employees. UFCW 1518 also argued that the companies’ communications with drivers violated ULP protections against employer participation or interference in formation, or selection of a union, and prohibitions on imposing an employment contract condition that seeks to restrain an employee from exercising rights under collective bargaining legislation.<sup>66</sup> UFCW 1518 claimed that some drivers declined to sign union membership cards because they believed they were not employees.<sup>67</sup>

In March 2020, this complaint was also dismissed.<sup>68</sup> The board held that UFCW 1518 had not provided sufficiently particularized facts for it to conclude that the companies “have structured their businesses in a disingenuous manner in order to frustrate any rights Drivers may have under the Code.”<sup>69</sup> Noting that whether an employment relationship exists is determined based on the true relationship and not the label given to it in a contract, the board held that, although the Uber and Lyft Terms of Service refer to independent contractor status, this does not prevent drivers who meet the criteria for dependent contractor from seeking unionization.<sup>70</sup> Further, the board held that, where drivers accept the non-employee, independent contractor status and, therefore, do not seek to join a union, this is not sufficient to constitute interference within the meaning of ULP prohibitions, even where the drivers are employees.<sup>71</sup> The board found insufficient basis in the Terms of Service to address the other claims and rejected any argument that the Terms of Service produced the inference that drivers attempting to assert statutory rights as employees would lead to termination.<sup>72</sup>

Notably, although these examples arose in jurisdictions recognizing dependent contractors as employees, status issues continued to pose substantial practical difficulties in each case. Even though it was likely that the workers would be found to be dependent contractors (as was the case for Foodora workers), it was still a long and costly struggle for the union and the workers, during which time support for unionization may have been lost, and the platform had the opportunity to reorganize and perhaps, as Foodora did, to depart the jurisdiction. These cases suggest that introducing a third or dependent contractor

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65. *Id.* ¶¶ 47–49.

66. *Id.*

67. *Id.* ¶ 7.

68. *Lyft Canada Inc.*, CanLII 2019-068701 at ¶ 50.

69. *Id.* ¶ 36.

70. *Id.* ¶¶ 40–41.

71. *Id.* ¶ 37.

72. *Id.* at 43–45.

category is unlikely to be sufficient to provide meaningful access to collective bargaining for digital workers. A framework that puts less emphasis on the employment relationship, that provides for status declarations separate from the certification application process, or that deems workers in specified sectors to be eligible to unionize would be of greater assistance.

These examples also illustrate the intractable difficulty unions face in meeting statutory requirements to demonstrate worker support for unionization at the application and representation vote stages because of the tremendous difficulty of identifying and contacting these diffuse, mobile, and isolated workers. Instead, it would be appropriate to provide these workers with a collective bargaining system in which certification decisions do not critically depend on identifying individual workers. Instead, certification requirements should reflect the nature of this work and workforce. More generally, these cases suggest that the potential significant delay due to strategic employer contestation of certification is a real concern in digital work cases and this, alone, may defeat effective organizing.

### III. SECTORAL SYSTEMS FOR DIGITAL WORKERS: *STATUS OF THE ARTIST ACT*

#### A. *Artists as Analogues*

As different as the situation of digital workers is from that of traditional employment contemplated by conventional statutory collective bargaining systems, this is not an entirely new situation. Using the example of Hollywood writers, as Catherine Fisk has pointed out, these artists were “gig” workers and “Hollywood was a gig economy long before the gig economy was a thing.”<sup>73</sup>

More generally, digital workers and arts and media workers have much in common. Both the nature of work in these industries and the attitudes and self-perceptions of the workers can be impediments to collective representation and bargaining. In the arts, work is intermittent and frequently of short duration. Artists commonly work for multiple engagers or employers at the same time, in multiple roles and activities, and may also engage in supplemental work outside the industry.<sup>74</sup> Like digital workers, artists typically operate in a “buyers’ market,” with pressure to accept exploitative contracts and often intense

73. Fisk, *supra* note 30, at 202.

74. Garry Neil et al., *Status of the Artist in Canada*, CANADIAN CONFERENCE OF THE ARTS 2–3, 5 (2010), <http://ccarts.ca/wpcontent/uploads/2010/10/StatusoftheArtistReport1126101-Copy.pdf> [<https://perma.cc/X39D-CJ3N>]; Martine D’Amours & Alexandre Arseneault, *Nouvelles Formes D’emploi, Représentation Collective et Régimes Alternatifs de Rapports Collectifs de Travail*, UNIVERSITE LAVAL, ALLIANCE DE RECHERCHE UNIVERSITES-COMMUNAUTES, INNOVATIONS TRAVAIL ET EMPLOI (2014), [https://www.aruc.rlt.ulaval.ca/sites/aruc.rlt.ulaval.ca/files/71281-cahier\\_ct-2014-008\\_damours-complet\\_final\\_juin\\_2015.pdf](https://www.aruc.rlt.ulaval.ca/sites/aruc.rlt.ulaval.ca/files/71281-cahier_ct-2014-008_damours-complet_final_juin_2015.pdf) [<https://perma.cc/GKZ5-RYJF>].



competition among workers.<sup>75</sup> Workers must often spend significant uncompensated time preparing to earn income through rehearsal or training and workers often bear high degrees of risk in compensation.<sup>76</sup> Perhaps in common with some high-skilled digital workers, ownership of intellectual property is of significant concern to many artists.<sup>77</sup>

Although arts and media workers often have a strong occupational identity,<sup>78</sup> they often work in isolation, without opportunity to build community, and this can be exacerbated by competition among workers for the same work.<sup>79</sup> As with some digital workers, some artists may not perceive their art as “work”<sup>80</sup> or may subscribe to a “myth of professionalism,” prompting a “dedication that supersedes financial gain.”<sup>81</sup>

### B. *Collective Bargaining and Artists*

Can these structural similarities between digital and arts and media work provide some guidance regarding statutory collective bargaining systems for digital workers? Returning to the example of Hollywood writers, Fisk disagrees with the notions that high-skill, entrepreneurial work is incompatible with collective bargaining, or that gig workers are suited only to a limited set of labor and employment rights and protections.<sup>82</sup> Hollywood writers engage in short-term work with little supervision, are geographically dispersed, are likely to be classified as independent contractors, and collective activities of these workers are vulnerable to challenges under competition law. Fisk notes that, despite these impediments, these workers have an eighty-year history of negotiating collective bargaining agreements on a sectoral, multi-employer basis.<sup>83</sup> This, Fisk contends, demonstrates that existing labor law can meet the needs of digital workers, and that legal insurmountable arising from labor legislation or competition law were not insurmountable for these writers and need not preclude access to collective bargaining for digital workers either.<sup>84</sup>

75. D'Amours & Arseneault, *supra* note 74; Marie-Josée Legault & Marine D'Amours, *Représentation Collective et Citoyenneté au Travail en Context de Projet*, 66 RELATIONS INDUSTRIELLES/IND. RELATIONS 655, 663 (2011); Joanne Kates & Jane Springer, *Organizing Freelancers in the Arts*, in UNION SISTERS: WOMEN IN THE LABOUR MOVEMENT 239, 242–43 (Linda Briskin & Lynda Yanz eds., 1983).

76. Neil et al., *supra* note 74, at 2–3, 6; D'Amours & Arseneault, *supra* note 74, at 2.

77. Neil et al., *supra* note 74, at 3, 28; D'Amours & Arseneault, *supra* note 74, at 2.

78. Elizabeth MacPherson, *Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for Other Industrial Sectors?*, 7 CAN. LAB. & EMP. L. J. 355, 380 (1999).

79. Kates & Springer, *supra* note 75, at 247.

80. Neil et al., *supra* note 74, at 2–3.

81. Kates & Springer, *supra* note 75, at 247.

82. Fisk, *supra* note 30. In this latter point, Fisk is referring to Harris and Kruger's “Independent Worker” proposal. See Harris & Krueger, *supra* note 32.

83. Fisk, *supra* note 30, at 178.

84. *Id.*

While artists in North America, beyond Hollywood writers, have successfully engaged in collective bargaining for decades,<sup>85</sup> it has generally consisted of voluntary collective bargaining taking place outside of statutory systems, rather than under North American WAM systems. Therefore, the example of the collective bargaining success of these writers may be more accurately regarded as having been achieved in spite of, rather than due to, existing labor legislation.

Nonetheless, a different, statutory approach to arts and media collective bargaining, which was designed for the particular characteristics of the industry, may be a helpful starting point for considering adapting statutory labor law for digital workers.

### C. *Status of the Artist System*

The 1992 federal SOA<sup>86</sup> was Canada's response to the United Nations Educational, Scientific and Cultural Organization's (UNESCO) 1980 recommendation. This recommendation invited Member States to take steps to, among other things,

...observe and secure observance of the standards relating to freedom of association, to the right to organize and to collective bargaining, set forth in the international labour conventions listed in the appendix to this Recommendation and ensure that these standards and the general principles on which they are founded may apply to artists.<sup>87</sup>

The SOA first recognizes the professional status of artists, including granting fundamental rights, and then establishes a sectoral collective bargaining system for self-employed workers in parts of the arts and media sector, with bargaining contemplated to take place between artists' associations and the producers, promoters, and employers ("producers") that engage artists.<sup>88</sup> Originally administered by a specialized independent agency (the Canadian Artists and Producers Professional Relations Tribunal) in 2013, this responsibility was transferred to the Canada Industrial Relations Board (the

85. See Neil et al., *supra* note 74, at 7.

86. Meanwhile, the province of Quebec passed two statutes relating to artists, in response to the UNESCO Recommendations. The 1987 Act respecting the professional status and conditions of engagement of performing, recording and film artists, C.Q.L.R., c S-32.1 and the 1998 Act respecting the professional status of artists in the visual arts, arts and crafts and literature and their contracts with promoters, C.Q.L.R., c S-32.01.

87. General Conf. of the U.N. Educ., Sci. and Cultural Org., *Recommendation Concerning The Status Of The Artist*, VI.5. (Oct. 27, 1980), [http://portal.unesco.org/en/ev.php-URL\\_ID=13138&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_DO=DO_TOPIC&URL_SECTION=201.html) [<https://perma.cc/LU46-P2Y2>].

88. Status of the Artist Act, S.C. 1992, c 33, s.7 (Can.) (describing the statute's purpose as: "to establish a framework to govern professional relations between artists and producers that guarantees their freedom of association, recognizes the importance of their respective contributions to the cultural life of Canada and ensures the protection of their rights.").

“Tribunal”), which is also responsible for administering the Canada Labour Code.<sup>89</sup>

In common with general North American collective bargaining legislation, the SOA provides for certification of an exclusive bargaining agent for a defined and appropriate unit of workers, a duty to bargain in good faith, enforceable collective agreements, a grievance procedure, ULP protection and “pressure tactics” during bargaining disputes. It also provides for compulsory dues check-off and first contract arbitration. As of 2012, twenty-six sectors have been defined and twenty-four artists’ associations have been certified pursuant to the SOA, resulting in approximately 180 bargained agreements.<sup>90</sup>

However, within this broadly familiar framework, the SOA incorporates several features that are at once distinctly different from the WAM, are tailored to the particular circumstances of self-employed artists, and are designed to overcome barriers to collective bargaining for this industry. In these respects, the SOA departs from the WAM. First, the SOA does not require workers to establish that they are employees. Instead, the statute applies to professional artists who are independent contractors, explicitly excluding employees within the meaning of that term in other applicable collective bargaining statutes.<sup>91</sup> However, those contracting through an organization are not excluded from the scope of the Act.<sup>92</sup> Consequently, the SOA applies to a wide array of self-employed professional artists, none of whom would have status to access WAM legislation.<sup>93</sup>

Second, in certification cases, the Tribunal assesses whether the applied-for sector is appropriate for bargaining.<sup>94</sup> The SOA does not define the term “sector,” but in making this determination, the Tribunal considers the following statutory criteria: the common interests of the artists in respect of whom the application was made; the history of professional relations among those artists, their associations, and producers concerning bargaining, scale agreements, and any other agreements respecting the terms of engagement of artists; and, any geographic and linguistic criteria that the Tribunal considers relevant.<sup>95</sup> Certified sectors have generally been craft-based and national in scope, with exceptions made in circumstances where language is a key part of the artistic expression.<sup>96</sup>

89. Status of the Artist Act Procedural Regulations, SOR/2003-343 (Can.) 148 CAN. GAZ. (2014), <http://canadagazetteducanada.gc.ca/rp-pr/p1/2014/2014-05-17/html/regl-eng.html> [https://perma.cc/PP37-ETQC].

90. Canadian Artists Representation/Le Front des artistes canadiens and Regroupement des artistes en arts visuels du Québec, 2012 CAPPRT 053 (Can.).

91. Status of the Artist Act, S.C. 1992, c 33, s.7, ss. 5, “artist,” 6(2)(b), 6 (Can.).

92. Status of the Artist Act, S.C. 1992, c 33, s. 9(1) (Can.).

93. The Status of the Artist Act applies to professional artists, not hobbyists.

94. Status of the Artist Act, S.C. 1992, c 33, ss. 17(p)(iv), 26(1) (Can.).

95. Status of the Artist Act, S.C. 1992, c 33, ss. 26(1)(a)–(c) (Can.).

96. MacPherson, *supra* note 78, at 363. Recall that Canada is an officially bilingual country.

This broad, sectoral approach – including national scope units and diverse criteria for appropriateness – avoids the fragmented, rigid, small units characterizing WAM certifications.

Third, the SOA certification procedure does not require applicants to demonstrate majority support among members of the proposed sector. Instead, an applicant will be certified where it demonstrates that it is the “most representative” of artists in the proposed sector.<sup>97</sup> The Tribunal exercises significant discretion in making this determination, generally considering the overall size of the sector (to the extent that this can be determined), the size of the applicant association’s membership, and whether there are any competing applicants.<sup>98</sup> Where another association is not also seeking certification or contesting representativeness, the Tribunal has been willing to accept the applicant’s estimates of the size of the sector for use in determining representativeness.<sup>99</sup> Rarely has the Tribunal concluded that such considerations are insufficient to determine the most representative association, such that it resorts to ordering a representation vote to determine this issue.<sup>100</sup> In appropriate circumstances, the Tribunal has found an applicant with far less than a majority of sector artists in its membership to be the most representative association.<sup>101</sup>

Therefore, SOA certification does not critically depend upon the applicant’s ability to accurately determine the number of individuals in the proposed unit and to obtain majority support, which are key features of WAM certification processes and, as illustrated earlier, significant and recurring obstacles to digital worker certification. This relieves applicants of the tremendous tasks of accurately calculating the number of workers, as well as identifying, locating, and contacting geographically diffuse and isolated workers.

97. Status of the Artist Act, S.C. 1992, c 33, ss. 28(1) (Can.). Although not germane to this discussion, another departure from the Wagner Model is that certifications are not indefinite and instead are issued for three-year renewable terms (Status of the Artist Act, S.C. 1992, c 33, ss. 28(2)).

98. MacPherson, *supra* note 78, at 365.

99. See In the matter of an application for certification filed by the Editors’ Association of Canada /Association Canadienne des réviseurs, 2001 CAPPRT 033 (Can.); see also In the matter of an application for certification filed by the Writers’ Union of Canada and the League of Canadian Poets, 1998 CAPPRT 028 (Can.).

100. Status of the Artist Act, S.C. 1992, c 33, ss. 17(h)(i) (Can.) (jurisdiction to direct a vote); see, e.g., Association des réalisateurs et réalisatrices du Québec, Union des artistes (No. 2 – directors/metteurs en scène and choreographers) and Association des professionnels des arts de la scène du Québec (directors/metteurs en scène), 1997 CAPPRT 024 (Can.) (in a certification case involving two applicant artists’ associations where the Tribunal decided the suitable sector to be different from each of the two sectors applied for by the associations, the Tribunal decided that it could not rely on membership lists and ordered a representation vote to determine which association was more representative).

101. MacPherson, *supra* note 78, at 365; see, e.g., In the matter of an application for certification filed by the Writers’ Union of Canada and the League of Canadian Poets, 1998 CAPPRT 028 (Can.) (membership was about twenty-four percent of sector).

Fourth, the SOA limits the opportunity for challenges to applicants' representativeness. The SOA provides that only members of the artists' association seeking certification and other artists' associations may intervene on the issue of representativeness as a matter of right. All others, including producers, must seek permission of the Tribunal.<sup>102</sup> Therefore, the scope for employer challenges relating to sufficient support is significantly diminished. As described above, employer objections to certification applications based on disputing whether sufficient support has been obtained are a significant impediment to digital worker organizing under the WAM systems.

Fifth, under the SOA, certified artists' associations and a producer or producers' associations negotiate "scale agreements" setting out minimum terms and conditions for provision of artists' services.<sup>103</sup> Scale agreements differ from traditional collective agreements in two important ways. First, a scale agreement is binding on all artists engaged by the relevant producer or producers' association, across the sector and whether or not the artist is a member of the certified association. Second, scale agreements establish a "floor" and an individual artist is free to negotiate an "above scale" personal-service contract, provided that the terms are superior or equal to those established in the scale agreement.<sup>104</sup> The opportunity for above scale individual agreements can protect artists with lower bargaining power by ensuring minimum terms, while at the same time allowing those with greater bargaining power the freedom to seek better terms.<sup>105</sup> This feature reflects the heterogeneous nature of the arts and media industry, and may be a useful element to consider incorporating into a statutory collective bargaining framework for digital workers, given the often heterogeneous nature of this work.

Finally, the SOA provides explicit exemption from liability to artists' associations and producers for acting in combination under competition legislation.<sup>106</sup> Notably, at the time the SOA was being contemplated, existing non-statutory artists' association collective agreements in the arts were subject to investigation of a complaint that such agreements violated competition law as exemptions applied only to collective agreements negotiated with trade unions.<sup>107</sup>

The SOA was among the first in the world to provide collective bargaining mechanisms to artists and is recognized as a model of good practice for arts

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102. Status of the Artist Act, S.C. 1992, c 33, ss. 27(2) (Can.).

103. Status of the Artist Act, S.C. 1992, c 33, s. 5 (Can.).

104. MacPherson, *supra* note 78, at 368.

105. Leah Vosko, *The Precarious Status of the Artist: Freelance Editors' Struggle for Collective Bargaining Rights*, in SELF-EMPLOYED WORKERS ORGANIZE: LAW, POLICY, AND UNIONS 136, 148 (Cynthia J. Cranford, et al. eds., 2005).

106. Status of the Artist Act, S.C. 1992, c 33 s. 9(2) (Can.) (referencing Canada, Competition Act, R.S.C., 1985, c C-34, ss. 4(1) (Can.)).

107. Neil et al., *supra* note 74, at 7.

regulation,<sup>108</sup> and may have potential application to independent contractors in other sectors.<sup>109</sup> As described above, some of the SOA's key elements are features that may also be suitable for adaptation to the digital labor context, and may provide a better framework for permitting digital workers an opportunity to exercise freedom of association, including collective bargaining. As such, the SOA legislation could be a powerful model for a collective bargaining statute for digital workers. However, the SOA model may be better suited to some categories of digital workers than others. This model may be less useful for workers lacking occupational identity, or where there is an absence of sectoral organization.<sup>110</sup>

#### IV. CONCLUSION

The question of whether existing statutory collective bargaining legislation, based on the WAM, can be made accessible to digital workers in North America focuses on challenges created by certain features of digital work (especially diffuse and isolated workers without defined places of work) and on particular legal issues (employee status and competition restrictions). This Article suggests that efforts to adapt collective bargaining legislation, which largely focus on addressing the employee status issue, are not particularly helpful, given the nature of other barriers faced by digital workers, illustrating this point with examples from recent organizing efforts in North America.

Although most legal barriers to digital worker collective bargaining can be addressed as matters of policy choice and should not be regarded as intractable obstacles, this Article suggests that, instead of seeking to modify general collective bargaining legislation (and particularly that based on the WAM), a more productive approach may be to consider a statutory system designed for this type of work. Drawing parallels between the situations of digital workers and arts and media workers, the SOA is analyzed as a possible starting point for such a bespoke collective bargaining regime.

The SOA model can readily accommodate work that is decoupled from location or time, with widely dispersed workers, and a range of high and low-skilled work. Particular features of the SOA model—including the definition of broad sectors; certification of “most representative” organizations, rather than demanding precise tallying of numbers of workers sought to be represented; reduced scope for employer challenges to representativeness; and, the flexibility

108. MARC GRUBER, CHALLENGES AND OPPORTUNITIES FOR DECENT WORK IN THE CULTURE AND MEDIA SECTORS 19 (INT’L LABOUR ORG., WORKING PAPER NO. 324, 2018), [https://www.ilo.org/sector/Resources/publications/WCMS\\_661953/lang=en/index.htm](https://www.ilo.org/sector/Resources/publications/WCMS_661953/lang=en/index.htm) [<https://perma.cc/A4G8-6QC9>].

109. MacPherson, *supra* note 78, at 355.

110. Elizabeth MacPherson, Presentation at CLPE Roundtable: Re-Imaging Forms and Approaches to Workplace Representation, Status of the Artist Act: A Model for Other Sectors? (Sept. 24, 2015).

of scale agreements—are well suited to the complexities of work in the digital economy. The key weakness of the SOA model is that, like all statutory labor law, it operates within a single jurisdiction, although it does offer the prospect of nation-wide sectoral certification and bargained agreements. As such, and like other labor legislation, it may be of greater use to place-based rather than cloud workers.

In conclusion, considering the prospects for statutory collective bargaining for digital workers, there may be value in focusing on what is familiar about this new form of work as well as what is truly new about it.